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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARIN COMMUNITY COLLEGE DISTRICT, Plaintiff and Appellant, v. MARCY WONG & DONN LOGAN ARCHITECTS, et. al., Defendants and Respondents.	A153695 (Contra Costa County Super. Ct. No. MSC-16-00857)

Marin Community College District (District) sued Marcy Wong & Donn Logan Architects (Architects) for professional negligence and breach of contract. The trial court granted summary judgment in favor of the Architects, ruling that the gravamen of both causes of action was professional negligence and that the District's complaint was barred by the statute of limitations. (Code of Civil Proc., § 339, subd. (1) (hereafter 339(1).)[1] We affirm.

BACKGROUND

A.

The Architects entered into a written agreement with the District to provide design services for the renovation and modernization of the District's performing arts complex and fine arts building. Among other things, the Architects agreed to perform services in

[1] Undesignated statutory references are to the Code of Civil Procedure.

accordance with "all applicable . . . codes, laws, regulations, and professional standards, consistent with the standard of care of an architect experienced in California schools and college design." Construction began in May 2011, and the project was completed approximately two years later.

By letter dated October 9, 2013, the District submitted a notice of claims to the Architects: "Pursuant to section 7.3 of the Agreement, Architect agreed that the services performed under the Agreement would 'be performed in a manner that conforms to the standards of architectural and engineering practice observed by other qualified design professionals experienced in California schools design.' [¶] This letter constitutes notice that the District is making claims against Architect for damages the District has incurred, and will incur, as a result of Architect's work on the Project. The District's claims against Architect include, but are not limited to, Architect's breach of its professional standard of care and contractual obligations . . . ."

B.

On December 24, 2015, the District sued the Architects for breach of contract and professional negligence. The complaint alleges the Architects provided architectural services that fell below the professional standard of care and they breached their contractual obligations, causing delays and cost overruns.

In paragraphs six and seven, which are incorporated in both of the District's almost indistinguishable causes of action, the complaint alleges: "Under the Contract, [the Architects were] required to perform the Architectural Services on time pursuant to the Project schedule in accordance with applicable laws and the standard of care of architectural and engineering practice performed by other qualified design professionals experienced in California schools and college design and performing services similar to the Architectural Services. Pursuant to the Contract, [the Architects were] required to review and verify all as-built information concerning the existing structures, facilities, and utilities, and [were] responsible for, among other things, the professional quality and technical accuracy, including code compliance, of all designs, drawings, specifications, and other Architectural Services furnished under the Contract, and the coordination of

same. [¶] . . . Under the Contract, [the Architects were] required during construction to, among other things, timely respond to Requests for Information . . . , issue necessary interpretations and clarifications through Architect's Supplemental Instructions . . . , review and approve Contractor submittals, perform construction administration and observation services, and, at its own expense, make all revisions and changes to the Project plans, drawings and specifications to correct [the Architects'] errors, omissions, or conflicts, so as to cause no delay or cost increase to the Contractor or the Project."

In the breach of contract cause of action, the District alleges the Architects breached "the Contract by inadequately performing and/or failing to perform their obligations under the Contract" in that the Architects' designs and specifications were negligently prepared, contained errors and omissions, and caused delays and cost overruns. Specifically, the District alleges the Architects provided "inadequate and inaccurate designs," "late revisions to plans and design changes," and "details that were incompletely drawn, incorrectly drawn, and/or drawn in an un-constructible manner." The District also alleges the Architects failed to "comply with applicable codes and laws," to perform the services "in accordance with the contractual standard of care," and to "properly perform construction administration and observation services." In its professional negligence cause of action, the District alleges the same conduct fell below the Architects' professional standard of care.

The Architects filed a motion for summary judgment. They argued the gravamen of the District's entire complaint was negligence, to which a two-year statute of limitations (§ 339(1)) applies, and it was time-barred because the complaint was filed more than two years after the District's claim notice. The District opposed the motion in part, conceding the negligence cause of action was time-barred, but contending the breach of contract cause of action was governed by the four-year limitations period provided by former section 337, subdivision (1) (current § 337, subd. (a)).

The trial court sustained evidentiary objections to the District's evidence and granted the Architects' motion for summary judgment. The trial court explained, "The gravamen of the contract breaches is negligence. [¶] Because the gravamen of the first

cause of action for breach of contract arises out of the negligent manner in which the contractual duties were performed or out of a failure to perform such duties, the tort limitations period applies." The court entered judgment in favor of the Architects.

DISCUSSION

The District contends that the trial court erred in determining its entire action was time-barred under section 339(1)'s two-year limitations period. It argues the court should have applied the four-year statute of limitations for breach of a written contract (§ 337, subd. (a)) to its cause of action for breach of contract. We agree with the trial court.

A.

In reviewing an order granting summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.) Although our review is de novo, the scope of our review is limited to those issues adequately raised and supported in the appellant's opening brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) We must presume the judgment is correct, and the appellant bears the burden of affirmatively demonstrating error. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) The District has forfeited any contention the trial court abused its discretion in sustaining objections to the District's expert declaration by failing to present argument on that point in its opening brief. (See *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41.)

B.

The applicable statute of limitations depends on whether the gravamen of the action is professional negligence or breach of contract. (*Voth v. Wasco Public Utility Dist.* (1976) 56 Cal.App.3d 353, 357.) That, in turn, depends on the nature of the right sued upon, not the form of the pleading, the labels of the causes of action, or the relief sought. (*Id*. at p. 356; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22–23.) If the gravamen of an action is professional negligence, the action is governed by the limitations period for professional negligence regardless of whether the parties also have a contractual relationship. (*Voth, supra*, at p. 357.) This rule has been applied to various

professions, including doctors (*Christ v. Lipsitz* (1979) 99 Cal.App.3d 894), accountants (*Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 503), real estate appraisers (*Slavin v. Trout* (1993) 18 Cal.App.4th 1536, 1539), and architects. (*Roger E. Smith v. Shn Consulting Eng'rs & Geologists* (2001) 89 Cal.App.4th 638; see also, *Voth*, *supra*, 56 Cal.App.3d at p. 357 [collecting cases].) A professional's standard of care operates independently of contract law, and a breach of that standard may be vindicated by a tort action. (*L.B. Laboratories, Inc. v. Mitchell* (1952) 39 Cal.2d 56, 62; *Voth*, *supra*, at p. 357.) A plaintiff may not extend the statute of limitations by styling an action as a breach of contract when, in fact, its gravamen is professional negligence. (*Christ*, *supra*, 99 Cal.App.3d at p. 899.)

"If the breach is both contractual and tortious, we must ascertain which duty is the quintessence of the action." (*Voth*, *supra*, 56 Cal.App.3d at p. 356.) The test is whether the defendant is sued for failure to perform a contractual promise to do a specific thing or, instead, is sued for performing negligently. (*L.B. Laboratories*, *supra*, 39 Cal.2d at pp. 62-63.) "In making this determination it is not sufficient that the cause of action is in some way remotely or indirectly connected with [a written] instrument or that the instrument is a link in the chain establishing the cause of action, but the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought." (*Benard v. Walkup* (1969) 272 Cal.App.2d 595, 601.) As our Supreme Court has explained, "[A]ctions based on a negligent failure to perform contractual duties . . . are regarded as delictual actions, since negligence is considered the gravamen of the action." (*L.B. Laboratories*, at p. 63.)

The District points to several contractual promises made by the Architects. For example, in the written contract, the Architects agreed to "review, update and verify all as-built information supplied by District concerning existing structures, facilities and utilities." The District alleges the Architects breached this specific contractual promise by failing to anticipate hazardous materials abatement in walls and ceilings, which necessitated a change order and contributed to 26 days of delays and additional costs.

Although the District's allegations may be mixed, we agree with the trial court that the gravamen of the District's complaint is professional negligence. It does not allege injury based on the Architects' failure to perform a contractual promise to do any specific thing. Rather, the District's causes of action are essentially indistinguishable, in that they both allege injury caused by the Architects' failure to perform the contracted-for services in accordance with the professional standard of care. It is undisputed the project was completed. The District does not argue that the contract assigned the Architects unusual tasks outside the ordinary role of architects. The District simply alleges the Architects' negligent performance of numerous contractual obligations caused delay and cost overruns. The trial court considered each of the alleged breaches, reviewed the evidence, and determined the District is essentially complaining about the competency of the Architects' work. We agree.

Curtis v. Kellogg & Andelson, supra, 73 Cal.App.4th 492 is instructive. In *Curtis*, a client sued its former accounting firm after receiving tax advice regarding the amount of compensation paid to an employee's wife. The Internal Revenue Service determined the compensation exceeded a reasonable allowance and required the client to pay tax penalties. Thereafter, the client sued the accounting firm for professional negligence, breach of fiduciary duty, fraud, and breach of contract on the basis the accounting firm never advised it that the compensation was excessive. (*Id.* at pp. 495–497.) The trial court dismissed the entire action as barred by the statute of limitations. (*Id.* at p. 499.) The reviewing court affirmed, concluding all three causes of action were untimely under the two-year limitations period (§ 339(1)). (*Curtis*, at pp. 499, 503.) The court explained: "Since the gravamen of the breach of contract and breach of fiduciary duty claims [is] the purported malpractice, the two-year statute of limitations applies." (*Id.* at p. 503.)

The District attempts to distinguish *Curtis* on the basis that the parties, in that case, agreed section 339(1) applied. That is incorrect. The parties agreed that Section 339(1) governed the professional negligence ("accounting malpractice") cause of action. (*Curtis, supra*, 73 Cal.App.4th at p. 499.) The court later applied the same limitations

period to the plaintiff's causes of action for breach of contract, fraud, and breach of fiduciary duty. (*Id*. at p. 503.)

The District cites several other legal principles—e.g., a plaintiff is generally permitted to allege different causes of action, with different statutes of limitations, upon the same underlying facts (see *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 605); the statute of limitations governing actions on written contracts is four years (see § 337(a)); and, in other states (Kansas), the negligent breach of a contract is grounded in contract (see *Taramac Dev. Co. v. Delamater, Fruend & Assoc* (1984) 234 Kan. 618, [675 P.2d 361.])

These arguments simply sidestep the law that applies in California when the gravamen of a case is professional negligence rather than traditional breach of contract. The District cannot circumvent the statute of limitations for professional negligence by labeling the action breach of contract. (*Christ, supra,* 99 Cal.App.3d at p. 899.) Although a cause of action alleging negligent failure to perform contractual duties is hybrid in nature, California courts have routinely applied the two-year statute of limitations when negligence is the gravamen. (See *L. B. Laboratories, supra,* 39 Cal.2d at p. 63; *Voth*, *supra*, 56 Cal.App.3d at p. 357; but see *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1058 ["applicable period of limitations for an action based upon the negligent performance of an implied obligation which is based upon a contract in writing is the four-year period prescribed by [former] section 337, subdivision 1"].)

The District concedes its cause of action accrued no later than October 9, 2013. Because the District did not file suit until more than two years later, on December 24, 2015, the action is time-barred. (§ 339(1).)

DISPOSITION

The judgment is affirmed. The Architects are entitled to their costs on appeal.

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.